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No. 559.

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,
Claimant.

BRIEF OF JUDSON HARMON, AMICUS CURIAE.

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(Italics mine unless otherwise stated.)

I file this brief, by the courtesy of counsel and permission of the Court, on behalf of independent manufacturers of apple cider vinegar who are directly interested in the questions involved in the case (R. 12 [9]) and will be affected by the decision of this case.

Much of what is urged to justify the seizure and secure reversal of the Circuit Court of Appeals judgment is entirely outside of the record and requires no comment, except that the attempt to inject it is confession of weakness.

MATTERS SETTLED BY THE RECORD.

The record disposes of various grounds for reversal relied on for the Libellant:

Guaranty of compliance with laws.

Falsity of the statement in the label "Guaranteed to comply with all food laws" is not in itself one of the three specifications in the libel (R. 1, 2), though it is quoted as part of the label, which all depend on the alleged false statement that "apples" were used when in fact they were "evaporated or dried" apples. If it were, the statement would refer to laws applicable to the goods seized, and these are only the laws of New York where the vinegar was manufactured and the Federal laws under which they were seized, which are substantially alike.

Similar vinegar manufactured by the Claimant in the same way was held to comply with the former in *People* v. *Douglas Packing Co.*, 236 N. Y. 1 (139 N. E. 759), reversing s. c. 194 N. Y. S. 633, on which the District Court relied (R. 19).

The Federal laws exclude other State laws with respect to goods in interstate commerce as these were, having been shipped from New York to Ohio and seized while in the original packages (R. 2, II), *McDermott* v. *Wisconsin*, 228 U. S. 115.

The agreed statement disposes of the following:

ADULTERATION (R. 1 [a]).

As to food, except as to "Second" substitution of any *substance* "wholly or in part for the article," and "Third" the abstraction in whole or in

part of "any *valuable* constituent" (referring, of course, to the completed article), the Federal act (34 Stat., Sec. 7, p. 770) contains these qualifications:

"First." When "any *substance* has been mixed and packed with it so as to reduce or lower or *injuriously affect its quality or strength.*"

"Fourth. If it be mixed, colored," etc., in "a manner whereby *damage or inferiority is concealed.*"

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article *injurious to health.*"

"Sixth. If it consists in whole or in part of a *filthy, decomposed* or *putrid* animal or vegetable substance," etc., with other specifications of the same class.

Some State laws, to which decisions cited relate, specifically prohibit "foreign *substances,*" no matter what, without enquiry whether they are injurious or not, such as milk (a natural product) diluted with water in the Massachusetts and New Hampshire cases cited and followed in *Commonwealth* v. *Burtnett,* 58 Supr. Court (Pa.) 604, where 20% of water beyond the natural amount was added to apple juice, a plain dilution, contrary to the State statute whose purpose was held to be to forbid "*diminishing or lessening the active properties of the cider vinegar,*" etc. (p. 611). The excess of water was of course "a foreign substance" in such cases.

The burden is on the Libellant of proving that the vinegar seized was adulterated because it came

within the qualified terms of the Federal act above set out. There is no such proof, and the contrary appears from the agreed statement:—

After partial dehydration of the apples to preserve them for use after the apple season, "an amount of *pure* water *substantially equivalent to that removed* in the evaporating process has been added," and pressure applied "until the liquid" thereby produced "has carried off in solution *such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar*" (R. 11 [4]).

"Such liquid, which is substantially *equivalent in quantity* to that which would have been obtained had unevaporated apples been used, contains a small *and entirely harmless* quantity of sulphur dioxide (from the fumes used 'to prevent rot, fermentation,' etc., R. 11 [3]) which is removed during the process of *fining and filtration,* by the addition of barium carbonate, *or some other proper chemical agent,* which by precipitation eliminates the sulphur compounds" (R. 11 [4]).

"The liquid is then subjected to alcoholic and subsequent acetic fermentation *in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples*" (id.).

"After fining and filtration the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated apples contains *a trace* of barium (or of course of

another chemical used) incident to the process of manufacture. *There is no claim by the Libellant that the trace of barium* renders the product *deleterious or injurious to health"* (R. 12, 2nd par.).

Barium carbonate in sufficient quantity may be poisonous, though this does not appear in the record and is not charged in the libel, but the "trace" found in this vinegar being admitted to be entirely harmless, like the "infinitesimal quantity" of arsenic in *W. B. Wood Mfg. Co.* v. *U. S.*, 286 Fed. 84, 86 (2), the suggestion that, by mistake, too much might be used in some other vinegar can hardly be taken seriously as a ground for confiscating this vinegar, when, during nearly twenty years, no such thing is shown to have occurred.

In the following paragraph (3rd, R. 12), there is the same admission as to the vinegar made from the liquid, including the absence of claim that the *trace* of barium (or other chemical used) renders it *"deleterious or injurious to health."* It is also admitted that it "is similar *in taste and in composition* to vinegar made from unevaporated apples" (R. 12, 3rd par.), and that the vinegar so made by Claimant and seized is *"not inferior to that made from unevaporated apples"* (R. 12 [5]).

It is admitted that there is no chemical test which shows that anything but *pure water* was removed from the apples in the partial dehydration (R. 11 [3]). The burden being on Libellant, this is the same in effect as a finding that nothing but water was taken from the apples. That this was true is demonstrated by the admitted fact that both the juice and the vinegar thereafter produced do not differ either in *taste or composition* from those

obtained without such dehydration, and only "*pure water*" was restored (R. 11 [4]).

SUBSTITUTION (R. 2 [b]).

The above facts which prove that there was no adulteration under Sec. 7 as charged in the libel (a), prove also that no "substance has been substituted wholly or in part for the article" named in the label, contrary to Sec. 7, Food paragraph "Second"; and that it was not "mixed, colored, etc., whereby *damage or inferiority* is concealed," contrary to paragraph "Fourth".

IMITATION (R. 2 [c]).

So the seizure must be upheld, if at all, under the charge (R. 2 [c]), that the "alleged apple cider vinegar" is "misbranded in that it *is an imitation of and offered for sale under the distinctive name of another article*, to-wit, *apple cider vinegar*, contrary to and in violation of paragraph First of Section 8."

The article being called and admitted to be vinegar in the agreed statement (R. 11 [1], R. 12, par. 3 *et passim*), having been made from apples alone without adulteration, substitution or "damage or inferiority" concealed or disclosed, and "similar in taste and composition" to vinegar made from unevaporated apples, the case narrows to the single question:

Did the introduction of partial dehydration, interrupting or suspending the passage of the apples from orchard to barrel, so change its character that calling it "apple cider vinegar" was "misbranding" under the statute, though without the

partial dehydration it is admitted (R. 12 [8]) that calling it such would not have been misbranding?

The question is presented in two aspects:

(1) Considering the partial dehydration as part of the process of manufacture;

(2) Considering it as creating a new and independent article, viz.: "evaporated apples" or "dried apples" which, though apples and nothing else, had to be mentioned in the label as the substance employed, to escape the penalty for deception by misbranding.

The partial dehydration considered as part of the process of manufacture.

In strictness the dehydration was rather an interruption or suspension than a part of the process of making the vinegar, which began with cutting up the apples, because it temporarily stopped the process instead of advancing it. But the effect on the case is the same in either view, since only the process is involved.

The expressed intent and purpose of the Pure Food Act are to prevent injury and deceit. "Misbranding" is used in the title in direct connection with "adulterated," "poisonous or deleterious." Sec. 11 uses this language about imports of food: "Is adulterated or misbranded within the meaning of this Act *or otherwise dangerous to the health of the people of the United States.*" Sec. 8 defines "misbranding" as: "Any statement, design or device • • • which shall be *false* or *misleading* in any particular."

These are all words of sinister import which always imply fraud as the motive or harm as the result, or both. So the maxim *noscitur a sociis* applies to "misbranding," if it be necessary to resort to construction. The purpose of Congress is stated in *United State* v. *Lexington Mill Co.*, 232 U. S. 399, 409, to be *to prevent injury to the public health* by *"misbranded and adulterated foods" alike;* and the gist of misbranding is defined as: "Misrepresentation *as to character and quality.*"

The Act is penal, but some courts do not give it the usual strict construction for that reason, because its purpose is to protect the public health, etc. But if its purpose is broadened by construction so as to cover unsubstantial and fanciful things, the reason ceases which prevents the usual more strict construction in favor of the accused.

The purpose and effect of partial dehydration are laudable, viz.: to reduce the appalling waste of apples in this country and prevent idleness of labor and capital during the larger part of the year. It is conservation, in the best and broadest sense, of an article of food. The making of vinegar is not a closed art and citizens engaged in it do not lack the resourcefulness which is characteristic of Americans. They have already improved the art in the way just mentioned to which is due, certainly in large measure if not entirely, the increase in output from $2,254,000 in 1910 to $24,671,000 in 1920 (R. 13 [11]). It is asserted, entirely outside the record, on behalf of an Association of Vinegar Manufacturers, that "There is ample time, during the three months when the fresh apple crop is avail-

able, to produce all the cider necessary for the manufacture of genuine cider vinegar" (B. 42). This, in connection with the above increase in production and the fact that the Claimant and "many" other independent manufacturers make vinegar during "the balance of the year" (R. 11 [2], 12 [9]), strongly suggests that commercial rivalry and a desire to limit production, not concern for the public, supplied the pressure which secured the regulation in question and is pushing its enforcement.

These independents have also, during the same period, sold as "apple cider vinegar" the vinegar made from this cider, as well as the "apple cider" itself as a beverage (R. 12 [9]). I do not contend that long use will justify a clear violation of the provisions of the Act, but it is a cogent fact in deciding whether they have been violated.

Is this improvement to be penalized when the product is admitted to be the same and not inferior? Are future improvements to be so treated? The process is certainly improved, for in the primitive way of making vinegar, to which counsel would shackle the industry, "the process of fining and filtration" now used must have been imperfect. And instead of the "sound, mature" apples used by the Claimant (R. 11 [2]), "apples that will do for cider" were used, as every country bred person knows.

I do not contend that this would justify any real injury or deception, but that, unless the burden of proving these is fully borne, the property of citizens is not to be confiscated and their enterprise

publicly condemned, under an official order or regulation not justified by the law.

Washington's well known warning against the tendency of men entrusted with authority to broaden and magnify it has not prevented instances of this. Interference with private rights is sometimes through the adoption and enforcement of regulations by executive departments or officials which are not necessary to carry out the purpose of the laws conferring their authority, and sometimes through giving the laws a strained and unreasonable construction. The function of the courts is to protect citizens against this peril, and they have often done so. See, for instance,

U. S. v. *Eaton*, 144 U. S. 677, 687-8.
U. S. v. *George*, 228 U. S. 14, 20-22.

in which departmental regulations were held invalid because they went beyond the authority to make them "for carrying out the provisions of this act" (as in Sec. 3 of the Pure Food Act) and thus became legislation instead of administration. Also in *W. B. Wood Mfg. Co.* v. *U. S.*, 286 Fed. (C. C. A. 7) 84, 87 (4), 88, cited for Libellant. Please note that the label there contained the phrase "Complies with all *requirements*," which was held to cover rulings of the Department, instead of "pure food *laws*" as here.

In President Taft's decision referred to in the brief he said the purpose of the Act as to misbranding is "to prevent (the public) from being deceived as to *the real character* of drugs or articles of food offered for sale."

Also, speaking of a department regulation:

"It is *a perversion of the Pure Food Act* to attempt now to limit the meaning of the term 'Whiskey' to that which *modern manufacture* and taste have made the most desirable variety." If the regulation had forbidden labeling the product of "modern manufacture" as "whiskey" it would be like this case, but that was evidently considered absurd, though such is the effect of the argument here.

In *Smith* v. *Rheinstrom*, 65 Fed. 984 (also cited) decided by the present Chief Justice, natural cherry juice had been boiled down and 17 *per cent. of alcohol added.* The only question was whether, under the customs act, it was commercial cherry juice or an alcoholic compound; and it was of course held to be the latter. If no alcohol had been added it would no doubt have been held to be the former, because it had all its elements and nothing else and neither the abstraction of the water, if for convenience or reduced cost of shipment and not as part of a process of compounding, nor the restoration of the same amount of water would have changed its character.

The 20 per cent. of water left in the apples carried all the elements of the juice, for otherwise when the water evaporated was restored and pressure applied, the juice and the vinegar made from it could not be *"similar in taste and in composition"* to vinegar made without partial dehydration of the apples (R. 12).

For the same reasons, admitted (R. 12, par. 2), this juice was as truly apple cider as the juice from

apples not so dehydrated. The vinegar could not be the same if the juice was not. There was no attempt to show that the juice used was not available for sale and use as cider the same as juice from apples not dehydrated. On the contrary, it is admitted, as above stated, that since several years before the passage of the act it has been sold as a beverage under the name "Apple cider" (R. 12 [9]). The alcoholic fermentation must be complete before the acetic fermentation can begin. It is well known from the public press that it is (or was) a common practice to concentrate and remove the alcohol in fermented cider by expelling the water with cream separators, since the specific gravities differ. Suppose one having done this should repent, restore the alcohol and let the acetic fermentation occur; would the product be any the less apple cider vinegar because its progress from apples to vinegar was thus temporarily interrupted, if every test and analysis showed that the product was not affected by the interruption? Or suppose it should be found, in the progress of the art, that it would facilitate or cheapen manufacture, without changing character or quality, and thus reduce the price of vinegar, either to hasten or to retard fermentation of the juice expressed from apples as they came from the tree, would the fact that this had been done have to be stated to avoid confiscation and penalty? Or that keeping the apples from rot by freezing instead of partial dehydration would reduce the price or improve the product? Or would the fact that the apples used had been kept in cold storage have to be stated, because of

the well known prejudice against articles so stored, though it made no difference in the product?

The omission to require a statement of the process by which an article is produced, or of the treatment of the primary substance used, proves an intention not to require it. This was doubtless to avoid the injury to manufacturers which disclosure to rivals of their methods, which may be secret, might inflict, and also because the public is amply protected by the other provisions of the act as to the *origin, nature and quality* of the *product*. And no administrative order, regulation or decision can enforce a requirement which the act thus omitted. If the maker chooses to disclose the process or methods he must do it truthfully, but as every one is presumed to know that the law does not require such disclosure there can be no deception if the label truly states the character of the article and its origin.

Every one, in America at least, must be presumed to know that improvements are being continually made in all industrial enterprises and that the general practice is to make fruits available after their season by preventing decay. How this is done does not matter if the product is not changed in character or quality.

A complete analogy in support of the Claimant's case is furnished by the Pure Food Department itself in its action relative to maple syrup. The sap of the maple tree is the basis material from which the water is partially evaporated to make syrup and further evaporated to make sugar. Yet when the water is restored to the sugar and it is

melted into syrup the label "Maple Syrup" is not a misbrand (Circular 136). Counsel, to be consistent, must assert that the brand should be "Maple Sugar Syrup."

The apples so partially dehydrated did not become a new and independent article which Claimant was required by the act to state as the substance used.

While the agreed statement refers to dehydrated apples and apples not dehydrated, and to the juice expressed from each, the former are not the "dried apples" or "evaporated apples" which are known, sold and used as food by that name. It is common knowledge that the latter are both peeled and cored before drying, so that they are only *parts* of apples, while the apples used in making the seized vinegar were neither peeled nor cored *but the entire apples were used.* This appears from the use of the word "apples" in the agreed statement without qualification, though it is not shown explicitly as in *People* v. *Douglas Packing Co., supra,* where the exact process is given in more detail, viz.: the entire apples are cut into thin slices and partly evaporated, being then known as apple "chops." The apples must, of course, be broken up in some way before evaporation can be applied to the water in them and before the juice is expressed. The "dried apples" or "evaporated apples" known to commerce and in common use are only the insides of apples, less the cores, cut into eight segments and dried sufficiently to stand transportation, storage, handling and indefinite

delay in use, while from the sliced apples used here only enough water was taken to keep them in the factory for a shorter period. They were not and could not become articles of commerce or be used as food.

What is lost with the skins and cores is not shown, but it is fair to presume that something is lost, in color, nutriment and taste. This is proved by the known use of them in manufactures.

> "The better specimens (of culls) are usually evaporated, *the cores and peelings being also utilized either for cider making,* or more frequently they are dried and shipped to Europe for *the manufacture of certain kinds of champagne and other wines.*" Encyclopedia Americana, Apples, "By-Products."

So vinegar made from apples peeled and cored, whether dried or not, would come within the prohibition of Food Section 7 "Second," since a "valuable constituent" would be "abstracted," though vinegar made from the peelings and cores would be "apple cider vinegar" because, as part of the "meat" remains with them, such vinegar contains all the elements of the fruit. The brand insisted on for the seized vinegar, "dried apple cider vinegar," or "vinegar made from the juice of dried apples," would be false, because it was made from whole apples and not from parts. And since, as I have shown, the partial removal of water during or as part of the process was not a fact whose statement the law requires, and, as admitted, the "*taste and composition*" were not changed thereby,

nor the vinegar made inferior, it was properly labeled.

The district judge found "slight differences in appearance and taste" in the samples of cider and of vinegar from both the partially evaporated and the unevaporated apples. But it does not appear that the same kind of apples were used in each, and these "slight differences" might well be due to differences of the apples used in color, in sweetness or lack of it, or in natural taste. No samples from "dried apples" were before him.

It is certainly dropping the declared purposes of the Pure Food Act below the horizon to test "misbranding" by the desires of an imaginary being who chooses his vinegar by its "bouquet," as one does (or did) with wines!

Even if, by forced construction of the law, the entire apples partly dehydrated could be considered no longer apples in course of manufacture into vinegar, they are wholly products or derivatives of apples. And while the act, Section 8 "Second" in the case of drugs, requires a statement of the amount of certain named derivatives and also in Section 8 "Second" in case of food, it is because these are dangerous *substances* and are *actual ingredients,* which a mere *"trace"* is not. See *U. S.* v. *Anti-Kamnia Co.,* 231 U. S. 654, 665-7. The omission to do the like with respect to food products generally proves the intention not to require such statement as to them.

I submit that the substance used in the seized vinegar was apples as they grew on the trees; that they were never anything but apples in course of manufacture; and that the vinegar produced was

"apple cider vinegar" and properly so labeled. It is admitted in the brief for Claimant that vinegars are designated in the dictionaries and elsewhere by the names of the fruits from which they are derived. No instance is shown where they are designated otherwise, or where the word "fresh" is used. And, if it were used, these apples were fresh when the process of manufacture began by slicing them up.

The inquiry what the objection is to changing the label so as to show the partial dehydration pending manufacture simply begs the question to be decided. The Claimant does not say its product is "something just as good" as apple cider vinegar, but that it *is* apple cider vinegar. It has therefore the right to call it by that name which it has borne unchallenged for many years (R. 12 [9]). To qualify the name, no matter how, would delight its competitors who would proclaim it as confession of substantial difference or inferiority, though it is admitted that there is neither.

Judicial notice taken by the District Court.

The trial court reached its decision only by taking judicial notice that "apple cider vinegar" means to the ordinary mind vinegar made from "fresh and undried apples" (R. 18). The meaning of this appears from the illustration used (id.) that a merchant advertising apples for sale "could not compel a purchaser to accept dried or evaporated apples." The fallacy of applying this supposed case to the case in hand is obvious. The contract of sale would be of apples in their natural

state and the buyer could no more be compelled to accept apples cut up or mashed for immediate use in making cider than apples sliced and partly dried for later use.

In *Brown* v. *Piper*, 91 U. S. 37, 42-3, dealing with judicial notice, it was held:

> "This power is to be exercised by courts with caution. Care must be taken that *the requisite notoriety* exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

In the present case there was no evidence as to the commercial meaning of "apple cider vinegar," nor any proof, as in *Nix* v. *Hedden*, 149 U. S. 304, that the words had no commercial meaning different from the ordinary meaning so as to permit the court to take judicial notice of the latter.

But if the ordinary meaning could be resorted to it is not what the trial court supposed it to be, as shown either by dictionaries as an aid or by "the requisite notoriety." That the substance from which such cider is derived is the apple is generally known; also that it is made by pressing out the juice and subjecting it to fermentation; but the general public knows little and cares less, when the product is what it is familiar with by use, what the exact steps of the process are, nor whether they proceed in close succession or not, nor whether after the apples are gathered decay is prevented until they can be used, nor how this is done.

Some older persons familiar with country life will remember the cider mill in the orchard or

barn operated by hand or horse power and the cider put in barrels in the cellar and left to settle and ferment without "fining and filtration." But it is certainly notorious that this primitive by-product of the farm has long been obsolete, replaced by the output of large factories requiring the assembling by shipment and storage of large quantities of apples which in the nature of things can not be immediately used and are subject to decay, and operated by the improved machinery and methods of "modern manufacture." The exact nature of these methods certainly is not and can not be generally known. The label does not disclose or profess to disclose them, so that persons who assume them to be other than they are, if they can be said to be deceived at all, are self-deceived. But all persons are conclusively presumed to know the provisions of the law which protects consumers by regulations of the product only, wisely leaving free as to processes of preservation and production the fertile genius of our manufacturers. If judicial notice is to be taken of anything it should be of this.

No decisions under the Federal act have been cited (except those of district courts on the exact question here presented) and I know of none where a charge of misbranding has been upheld on such a fanciful ground as that relied on here. The proper view is well stated by Judge Brown in *In re Wilson,* 168 Fed. 566, 568:

> "The court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation,

and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think we should be obliged to go not only outside the boundaries of legal and equitable rules, but also outside the boundaries of rational common sense.

From examination of former cases dealing with the subject of misleading representations of labels, I am impressed with the great value of the legislation known as the 'Pure Food Act,' but I am further impressed with the fact that an attempt to apply that act to cases of this character can not but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor."

In that case the label was "Gold Leaf Syrup composed of Maple and White Sugar," with a representation of a maple leaf. The charge was that the label and device were calculated to lead purchasers to believe that maple sugar was the principal or a substantial part of the compound, whereas it was only 10 per cent. of it.

There is nothing in the present case which equals the *innuendo* from the maple leaf. The article there was sold as a compound without reference to the proportions of the components. The article here was sold as vinegar made from apples by fermentations of their juice without reference to particulars of the various stages of the manufacture, which it is admitted did not affect either the iden-

tity or the qualities of the product, the only things of concern to consumers.

In re Wilson, supra, was cited and followed in *U. S.* v. *Boeckmann,* 176 Fed. 382, and the same principle was applied in *Nave-McCord Mercantile Co.* v. *U. S.,* 182 Fed. (C. C. A. 8) 46.

The independent decisions of the Circuit Court of Appeals in the present case and of the Court of Appeals of New York, on statutes substantially alike, were rendered after full argument and briefs by counsel and briefs by the same *amici curiae* who are permitted to appear here. In both petitions for rehearing were considered and overruled. In so far as I may be thought to have added little to the reasoning of those decisions, I beg the indulgence of the court.

Respectfully submitted,

JUDSON HARMON,
Amicus Curiae.

March, 1924.